FILED
FEB 4 2000
OFFICE OF THE CLERK

No. 99-1060

In the Supreme Court of the United States

LOCKHEED MISSILES AND SPACE COMPANY, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA EX REL.
MARGARET A. NEWSHAM AND MARTIN OVERBEEK BLOEM,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ANDREW L. FREY*
ROY T. ENGLERT, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

**Counsel of Record*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

ARGUMENT 2

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION TO APPLY THE 1986 FALSE CLAIMS ACT RETROACTIVELY 2

A. There Is A Strong Presumption Against Retroactive Legislation 3

B. The Ninth Circuit's Decision On What Constitutes The Relevant Event For Purposes Of Determining Retroactivity Conflicts With Decisions Of This Court 3

II. THE COURTS OF APPEALS ARE DIVIDED IN THEIR INTERPRETATION OF WHAT CONSTITUTES "PUBLIC DISCLOSURE" AND WHO IS AN "ORIGINAL SOURCE" UNDER THE 1986 FALSE CLAIMS ACT 7

A. The Courts Of Appeals Are Divided On What Constitutes A "Public Disclosure" 8

B. The Courts Of Appeals Are Divided On Who Qualifies As An "Original Source" . . . 10

TABLE OF CONTENTS — Continued

Page

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION THAT STATE-LAW "SPECIAL MOTIONS TO STRIKE" MAY BE MADE IN FEDERAL COURTS 12

A. The California Anti-SLAPP Statute Is Displaced By Federal Law 14

B. The Question Of The Applicability Of State Anti-SLAPP Statutes In Federal Court Is Worthy Now Of The Court's Review 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

AirTran Airlines, Inc. v. *Plain Dealer Publ'g Co.*, 66 F. Supp. 2d 1355 (N.D. Ga. 1999) 20

Baker v. *Coxe*, 940 F. Supp. 409 (D. Mass. 1996) 20

Burlington N. R.R. v. *Woods*, 480 U.S. 1 (1987) 14, 17-18

Church of Scientology v. *Wollersheim*, 42 Cal. App. 4th 628 (1996) 13, 16-17

Cohen v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) 18

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 3

Hanna v. *Plumer*, 380 U.S. 460 (1965) 20

Hughes Aircraft Co. v. *United States ex rel. Schumer*, 520 U.S. 939 (1997) 2-6

Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 3, 5, 6

Ludwig v. *Superior Ct.*, 37 Cal. App. 4th 8 (1995) 13

Martin v. *Hadix*, 119 S. Ct. 2005 (1999) 5

TABLE OF AUTHORITIES — Continued

Page(s)

Opinion of the Justices (SLAPP Suit Procedure), 138 N.H. 445, 641 A.2d 1012 (1994) 14

Pepsi-Cola Co. v. *Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266 (D.R.I. 1997) 20

Robertson v. *Rodriguez*, 36 Cal. App. 4th 347 (1995) 13

Rogers v. *Home Shopping Network, Inc.*, 57 F. Supp. 2d 973 (C.D. Cal. 1999) 15

United States v. *Bank of Farmington*, 166 F.3d 853 (7th Cir. 1999) 9, 12

United States ex rel. Anderson v. *Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), cert. denied, 516 U.S. 1043 (1996) 6

United States ex rel. Branahn v. *Mercy Health Sys.*, 188 F.3d 510, 1999 WL 618018 (6th Cir. 1999) 9

United States ex rel. Doe v. *John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) 8, 9

United States ex rel. Hafter v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156 (10th Cir. 1999) 11

TABLE OF AUTHORITIES — Continued

Page(s)

United States ex rel. Kreindler & Kreindler v. *United Techs. Corp.*, 985 F.2d 1148 (2d Cir. 1993) 8

United States ex rel. Mistick PBT v. *Housing Auth.* 186 F.3d 376 (3d Cir. 1999) 9, 12

United States ex rel. Ramseyer v. *Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996) 9

United States ex rel. Springfield Terminal Ry. v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994) 8

United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A. v. *Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) 8-9

Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980) 14-15, 18-19

Wallace v. *Reno*, 24 F. Supp. 2d 104 (D. Mass. 1998), aff'd, 194 F.3d 279 (1st Cir. 1999) 4

Wilcox v. *Superior Court*, 27 Cal. App. 4th 809 (1994) 13, 16, 17

TABLE OF AUTHORITIES — Continued

Page(s)

Statutes and Rules:

Cal. Civ. Proc. Code § 425.16 13-20

Del. Code. tit. 10 §§ 8136-8138 19

Ga. Code § 9-11-11.1 19

Mass. Gen. Laws ch. 231 § 59H 19

Me. Rev. Stat. tit. 14 § 556 19

Minn. Stat. §§ 554.01 to 554.045 19

Neb. Rev. Stat. §§ 25-21,241 to 25-21,246 19

Nev. Rev. Stat. §§ 41.635 to 41.670 19

N.Y. Civ. Prac. L. & R. §§ 3211(g), 3212(h) 19

N.Y. Civ. Rights L. § 70-a 19

R.I. Gen. Laws §§ 9-33-1 to 9-33-4 19

Tenn. Code §§ 4-21-1001 to 4-21-1004 19

Wash. Rev. Code §§ 4.24.510, 4.24.520 19

Fed. R. Civ. P. 11 . . . . . 2, 14, 16, 17, 19

Fed. R. Civ. P. 12 . . . . . 2, 14, 16, 19

Fed. R. Civ. P. 56 . . . . . 2, 14, 16, 19

Fed. R. App. P. 5 . . . . . 14, 15

TABLE OF AUTHORITIES — Continued

	Page(s)
28 U.S.C. § 1291	14, 15
28 U.S.C. § 1292	14, 15
28 U.S.C. § 2072	1, 2, 5, 9, 10, 14
31 U.S.C. § 3730	7, 10

Miscellaneous:

19 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4510 (2d ed. 1996 & supp. 1999) 15

Braun, *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965 (1999) 19

Kikkawa, *Medicare Fraud and Abuse and* Qui Tam*: the Dynamic Duo or the Odd Couple?* 8 HEALTH MATRIX 83 (1998) 1

Salcido, *Screening Out Unworthy Whistleblower Actions*, 24 PUB. CONT. L.J. 237 (1995) 10

Vogel, *The Public Disclosure Bar Against Qui Tam Suits*, 24 PUB. CONT. L.J. 477 (1995) . 10

INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States is the largest federation of business companies and associations in the world. It represents well over three million businesses and professional organizations of every size, operating in every sector of business and in every region of the country. Among the Chamber's members, a significant number have contracted to provide goods or services to the United States government in significant amounts.[1]

In this case, the Ninth Circuit held that the 1986 amendment to the False Claims Act (FCA) governs events that occurred before the amendment became effective. The court also held that, under the amended FCA, the disclosure of information either to a contractor's employees or through civil discovery does not constitute "public disclosure" sufficient to bar a *qui tam* action; and that a relator under the FCA can be an "original source" of information even if he provided the government no "direct and independent" information. Important as the decision is to petitioner, the decision has ramifications for scores of other businesses. *Qui tam* suits have proliferated beyond military contracting and have become a major source of federal court litigation in the health care field.[2] *Amicus*'s members have an enduring

---

[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

[2] See, *e.g.*, Kikkawa, *Medicare Fraud and Abuse and* Qui Tam*: the Dynamic Duo or the Odd Couple*? 8 HEALTH MATRIX 83, 94-95 (1998) ("[T]he predominant target of *qui tam* suits has shifted from defense contractors to health care providers and other federal program suppliers. In fact, [m]ore than 20% of the *qui tam* cases filed since the 1986 amendments have involved allegations of fraud against the United States Department of Health and Human Services." (internal quotation marks omitted)).

and vital interest in judicial fidelity to the substantial limits that the Supreme Court and Congress have placed on the imposition of such burdens.

In a distinct though equally important part of its decision, the Ninth Circuit held that respondents could bring a "special motion to strike" petitioner's counterclaims under California law. A "special motion to strike" is a state-created procedural rule analogous to, but in conflict with, Federal Rules of Civil Procedure 11, 12 and 56. Its use in federal court is thus forbidden by the Rules Enabling Act, 28 U.S.C. § 2072. The members of *amicus* have an interest in the uniform — and correct — application of procedural rules in the federal courts.

ARGUMENT

I. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION TO APPLY THE 1986 FALSE CLAIMS ACT RETROACTIVELY

In *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), this Court reversed a Ninth Circuit decision and unanimously held that the 1986 amendment to the False Claims Act, Pub. L. No. 99-562, 100 Stat. 3153, does not apply retroactively. Here, however, the Ninth Circuit in effect held the contrary. Its decision allows respondents to pursue a *qui tam* case even though the law at the time the allegations of fraud were disclosed to the government — before 1986 — barred such a suit. This gives the 1986 amendment retroactive scope by changing the legal effect of pre-1986 conduct and events. In the absence of clear congressional language or intent to the contrary, however, an amendment to a statute does not change the legal effect of any conduct engaged in before the effective date of the amendment. The Court should grant review of the Ninth Circuit's erroneous decision.

A. There Is A Strong Presumption Against Retroactive Legislation

Because "the presumption against retroactive legislation is [so] deeply-rooted in our jurisprudence," *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994), the governing principles bear emphasis. The reasons for the presumption against retroactivity are manifest: At bottom, "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* Retroactive legislation "presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 533 (1998) (plurality opinion) (internal quotation marks omitted). "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf*, 511 U.S. at 265-66. The retroactive revision of laws thus destabilizes business and deters investment. See *Eastern Enters.*, 524 U.S. at 549 (Kennedy, J., concurring). More generally, the retroactive application of legislation can undermine "confidence in the constitutional system." *Ibid.*

B. The Ninth Circuit's Decision On What Constitutes The Relevant Event For Purposes Of Determining Retroactivity Conflicts With Decisions Of This Court

Against the foregoing backdrop, it is plain that the Ninth Circuit took too narrow a view of the pre-amendment conduct that must not be accorded retroactive legal significance. The Ninth Circuit focused solely on "the alleged presentation * * * of a false claim" after 1986 while disregarding the legal effect of the pre-1986 disclosures of the alleged fraud. Pet. App. at 12a-13a. In this the Ninth Circuit erred. Under *Hughes Aircraft* — and the "timeless and universal" presumption against retroactivity, *Landgraf*,

511 U.S. at 265 — the relevant conduct the consequences of which may not be affected retroactively is *both* the making of an allegedly false claim *and* the disclosure of fraud to the government. See, *e.g.*, *Wallace* v. *Reno*, 24 F. Supp. 2d 104, 115 (D. Mass. 1998), aff'd, 194 F.3d 279 (1st Cir. 1999). Thus, if in a *qui tam* action *either* the false claim *or* the disclosure occurred before the effective date of the 1986 amendment, the amendment does not apply, and the action is barred. A proper reading of the 1986 amendment and of *Hughes Aircraft* shows why.

The 1986 amendment established a new legal framework for the regulation of false claims. Prior to its adoption, a *qui tam* suit was barred once the government knew about allegedly fraudulent behavior — whether through the disclosure of a potential *qui tam* plaintiff or otherwise. The amendment changed the focus to public disclosure, rendering the government's knowledge irrelevant.

In *Hughes Aircraft* both the claims and the disclosure of the alleged fraud antedated 1986 (which is why the Court did not identify the "relevant conduct" for purposes of retroactivity, 520 U.S. at 946 n.4). But critical to the holding that the 1986 amendment could not be applied retroactively — and thus to the determination of what conduct was "relevant" — was the Court's analysis of the statute's effects. The amendment

> eliminates a defense to a *qui tam* suit — prior disclosure to the government — and therefore changes the substance of the existing cause of action for *qui tam* defendants by attach[ing] a new disability, in respect to transactions or considerations already past.

Id. at 947 (internal quotation marks omitted). Thus while it is undoubtedly true that making a false claim is *a* "relevant event" for retroactivity purposes — since applying the 1986 FCA to pre-1986 claims would impose new liabilities on past conduct — it is equally true that the disclosure to the government is a relevant event, since applying the 1986 FCA

to pre-1986 disclosure would save relators' causes of action that had previously been barred, thereby imposing new burdens on government contractors. Thus, under *Hughes Aircraft* and this Court's other retroactivity cases, if in a *qui tam* suit *either* allegedly false claims were made before the 1986 amendment took effect, *or* information concerning the claims was disclosed before the effective date, the application of the amendment would "attach new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270; see also *Martin* v. *Hadix*, 119 S. Ct. 2005, 2006 (1999).

Here, respondents based their action on the allegation that petitioner had made false claims both before and after the amendment's effective date. All agree that the pre-amendment claims cannot be the subject of a *qui tam* suit. The same ban on giving retroactive effect to the 1986 amendment also precludes *qui tam* pursuit of the later claims. The later claims did not arise from a new or different scheme, but were part of a course of alleged misconduct that supposedly continued past the change in the law. The government had information about the alleged fraud, even as to those claims formally submitted after the amendment's effective date.

Respondent Newsham's pre-enactment disclosures carried important legal consequences affecting the nature of petitioner's exposure to litigation.[3] Once those disclosures were made, no one but the government was empowered to decide whether the activities described in the disclosures warranted suit against the contractor. The Ninth Circuit's decision improperly changes the legal effect of the prior disclosures by allowing a relator to challenge alleged false claims submitted after 1986 despite the government's pre-

---

[3] Respondent Bloem never disclosed anything to the government (see Pet. 22) and thus could not have been an "original source" regardless of whether he had any "direct and independent knowledge" of any alleged fraud.

1986 knowledge of the underlying conduct. This approach to *Hughes Aircraft* strips the case of much of its legitimate force.

Moreover, the Ninth Circuit's take on retroactivity rests on no discernible neutral principle. Here, the panel held that petitioner's submission of allegedly false claims, and not respondent Newsham's disclosures of the basis for the allegations, was the "relevant conduct" for retroactivity analysis. Pet. App. 11a-12a. Respondents were thus allowed to pursue their *qui tam* action under the amended FCA. But the panel's decision in this case is irreconcilable with a previous panel's decision in *United States ex rel. Anderson* v. *Northern Telecom, Inc.*, 52 F.3d 810 (9th Cir. 1995), cert. denied, 516 U.S. 1043 (1996). The *Anderson* panel held that disclosure to the government is the relevant event for retroactivity; the effect of this holding was to allow the relators there to pursue a claim that would otherwise have been barred. The panel here did not even mention the previous panel's decision in *Anderson*, much less follow its holding. In the Ninth Circuit, it seems, the "law" on retroactivity is little more than an pretext for holding that the government contractor always loses.

As this Court wrote in *Landgraf*, "unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." 511 U.S. at 283 n.35. Here, the unfairness to petitioner is plain. The government knew of allegations of fraud before the 1986 amendment. It had investigated, found no misconduct, and declined to proceed. Petitioner was able to order its business knowing that it would not be at legal risk if it submitted additional claims based on practices that the government had decided not to contest. If the Ninth Circuit's decision is to stand, however, petitioner would be subjected to newly minted jeopardy (and respondents given a corresponding windfall) that otherwise would have been barred. This is surely a text-book instance of the unfairness that the presumption against retroactivity is meant to avoid.

II. THE COURTS OF APPEALS ARE DIVIDED IN THEIR INTERPRETATION OF WHAT CONSTITUTES "PUBLIC DISCLOSURE" AND WHO IS AN "ORIGINAL SOURCE" UNDER THE 1986 FALSE CLAIMS ACT

The currently effective FCA, in relevant part, deprives courts of jurisdiction over *qui tam* actions that are

> [1] based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media *unless* * * * [2] the person bringing the action is the *original source* of the information.

31 U.S.C. § 3730(e)(4)(A) (emphases added). The statute defines an "original source" as someone "who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action." *Id.* § 3730(e)(4)(B). Even assuming that the Ninth Circuit correctly held that the post-1986 FCA, rather than the pre-1986 FCA, should apply to this case, the Ninth Circuit committed two fundamental errors in construing the amended statute. First, it incorrectly held that the disclosure of information in government audit reports or in civil discovery is not a "public disclosure" under the statute. Second, it erroneously expanded the concept of "original source" to embrace someone who conveys no information directly concerning the alleged fraud. The readings of "public disclosure" and "original source" are at odds with the constructions given the terms by other courts of appeals. The Court should resolve the conflicts by granting review and thus provide critical guidance to the government, to would-be *qui tam* plaintiffs, and to the courts on the scope of the amended FCA.

A. The Courts Of Appeals Are Divided On What Constitutes A "Public Disclosure"

As the petition explains (at 16-18), pivotal allegations of fraud on petitioner's part had been the subject of a government audit (see Pet. App. 12a), and other allegations were first revealed to respondents during discovery in this case (*id.* at 13a). The Ninth Circuit concluded that these events did not constitute "public disclosure" of the allegations of fraud, and some other courts of appeals have agreed with this narrow conception. Other courts of appeals, however, have read the term to embrace these kinds of disclosures.

The Second Circuit, for instance, has held that information is publicly disclosed when it is revealed to employees of the company accused of fraud on the government. See *United States ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 322 (2d Cir. 1992). Rejecting the argument that "for the disclosure to be 'public,' the information must be potentially accessible to any member of the public," *ibid.*, the Second Circuit reasoned that the disclosure was "public" because the contractor's innocent employees were under no obligation to keep the information confidential, see *id.* at 323. The Second Circuit has likewise held that material produced in civil discovery is publicly disclosed if filed with a court. *United States ex rel. Kreindler & Kreindler* v. *United Technologies Corp.*, 985 F.2d 1148, 1157 (2d Cir. 1993); accord *United States ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645, 652-653 (D.C. Cir. 1994) (distinguishing between filed and unfiled discovery materials).

The Third Circuit has read the words "public disclosure" even more broadly, holding that the statute bars *qui tam* suits "based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator" — including information contained in discovery materials that were not filed with a court. *United States ex rel. Stinson, Lyons, Gerlin & Bustamante P.A.* v. *Prudential Ins. Co.*, 944 F.2d 1149,

1155-56 (3d Cir. 1991). The Sixth Circuit shares the Third Circuit's interpretation of the statute: information is publicly disclosed so long as it is "available to anyone who request[s] it." *United States ex rel. Branahn* v. *Mercy Health Sys. of S.W. Ohio*, 188 F.3d 510, 1999 WL 618018 (6th Cir. 1999).

The Tenth Circuit has disagreed, finding "public disclosure" only where the government makes an affirmative act of disclosure, though the disclosure can be to a single person. *United States ex rel. Ramseyer* v. *Century Healthcare Corp.*, 90 F.3d 1514, 1520-21 (10th Cir. 1996). The Seventh Circuit, finally, has held that information is publicly disclosed only if a disclosure is made either to the "public at large" or to a public official, as opposed to a single "private person." *United States* v. *Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999); see also *United States ex rel. Mistick PBT* v. *Housing Auth. of City of Pittsburgh*, 186 F.3d 376, 391 (3d Cir. 1999) (Becker, C.J., dissenting), petition for cert. filed, 68 U.S.L.W. 3891 (U.S. Dec. 8, 1999) (No. 99-969).

The cramped readings of the words "public disclosure" by the Ninth Circuit and likeminded courts are in error. As the text of the FCA itself suggests, the term "public disclosure" cannot be limited to disclosure to the world at large; the statute refers not only to disclosures through "the media," for instance, but also to disclosure in a "Government Accounting Office audit," which is not the type of disclosure likely to be disseminated widely, if at all. See, *e.g.*, *John Doe Corp.*, 960 F.2d at 323 (noting that, if Congress had thought that disclosure to a contractor's innocent employees was nonetheless not "public," "we would expect a narrower exception to jurisdiction" based on disclosure to the media and widely accessible government documents).

The legislative history confirms that Congress did not intend "public disclosure" to mean only disclosure to the

public at large.[4] The broader understanding of "public disclosure" as a disclosure to anyone not in the government is also more consistent with the purposes of the FCA. Were disclosure to employees of a government contractor not considered disclosure to the "public," as the Ninth Circuit ruled, the employees would have the opportunity to sue based on information obtained from the government — precisely the type of "parasitic" *qui tam* action that Congress was attempting to prevent.

B. The Courts Of Appeals Are Divided On Who Qualifies As An "Original Source"

The Ninth Circuit interpreted the phrase "original source" so broadly that a relator can be deemed an original source of information even if he or she provided no direct and independent information concerning the incidents that actually constitute the factual basis for a *qui tam* complaint. This reading of the FCA is both implausible and in conflict with the readings of other circuits.

The FCA defines an "original source" as "an individual who has *direct and independent knowledge of the information on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B) (emphasis added). Under the natural reading of this statutory language, someone seeking to qualify as an "original source" must have done more than provide information that merely *leads to* the discovery of information that forms the basis of a complaint, or provide information about a supposed *pattern* of conduct that might form the basis of the complaint. Rather, an original source

---

[4] See Salcido, *Screening Out Unworthy Whistleblower Actions*, 24 PUB. CONT. L.J. 237, 250-62 (1995); Vogel, *The Public Disclosure Bar Against* Qui Tam *Suits*, 24 PUB. CONT. L.J. 477, 481-91 (1995).

must provide information regarding the very conduct that allegedly violates the FCA.

The Ninth Circuit, however, read this statutory provision far more broadly. As the petition explains (at 21-23), respondent Newsham, the only possible "original source," had been terminated in 1984 and thus could not have had any "direct and independent knowledge" of any supposed fraud by petitioner that occurred after her termination. Since the only claims remaining in the case concern the period after Newsham's termination, she could have been an original source only under one of two possible explanations: either because she provided information to the government in 1984 that prompted investigations leading to the uncovering of the alleged post-1986 fraud; or because she provided information regarding a pattern of pre-1986 conduct, which pattern continued after 1986. Either way, respondent Newsham was held to be an original source even though she gave the government no information regarding any specific instances of fraud that she now alleges took place after 1986.

The Ninth Circuit's decision not only rests on an implausible reading of the statute, it also fosters precisely the kind of parasitic *qui tam* suit that Congress meant to foreclose. As the Ninth Circuit itself acknowledged, "[t]he relators asserted that they did not learn of the basis for some of these [post-1986] claims until they conducted discovery" after filing their complaint in 1988. Pet. App. 13a. Given the Ninth Circuit's expansive definition of "original source," anyone who passed on rumors that triggered a government investigation would then be able to use discovery of in connection with that investigation as the basis for a *qui tam* suit. Thus the Ninth Circuit's holding throws open the door to "parasitic plaintiffs who offer only secondhand information, speculation, background information or collateral research." *United States ex rel. Hafter* v. *Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1162-63 (10th Cir. 1999).

The Ninth Circuit's holding also conflicts with the holdings of other circuits. As the Tenth Circuit has held, "To establish original source status knowledge [sic], a *qui tam* plaintiff must allege specific facts * * * showing exactly how and when he or she obtained direct and independent knowledge of the fraudulent acts alleged in the complaint and support those allegations with competent proof. * * * Direct and independent knowledge is knowledge marked by the absence of an intervening agency and unmediated by anything but the relator's own labor." *Hafter*, 190 F.3d at 1162; see also *Mistick PBT*, 186 F.3d at 389 ("a relator cannot be said to have 'direct and independent knowledge of the information on which [its fraud] allegations are based,' if the relator has no direct and independent knowledge of the allegedly fraudulent statements" (citation omitted)); *Bank of Farmington*, 166 F.3d at 864 (holding that a party is not an original source when "knowledge of a piece of information essential to her claim" was derived entirely from or depended upon testimony in another case). This Court should grant review to resolve the conflict among the circuits.

III. THE COURT SHOULD REVIEW THE NINTH CIRCUIT'S DECISION THAT STATE-LAW "SPECIAL MOTIONS TO STRIKE" MAY BE MADE IN FEDERAL COURTS

The Ninth Circuit held that respondents could move to dismiss petitioner's counterclaims for breach of fiduciary duties and other torts. According to the panel, this motion could be predicated not on the Federal Rules of Civil Procedure but on a "special motion to strike" under the so-called "anti-SLAPP" provisions of the California Civil Procedure Code. This holding — that respondents could block the assertion of claims within the jurisdiction of the federal courts by making use of a special state procedural rule that has no federal counterpart — presents an important question of federal procedure that warrants this Court's consideration.

A "SLAPP" suit (for Strategic Lawsuit Against Public Participation), as defined by the California "anti-SLAPP statute," is "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." CAL. CIV. PROC. CODE § 425.16(a); see *Wilcox* v. *Superior Ct.*, 27 Cal. App. 4th 809, 816 (1994). In order to deter SLAPP suits, California provides defendants in such cases with a procedural remedy: a "special motion to strike."[5] The movant must make a *prima facie* showing that "the plaintiff's cause of action arises from the defendant's free speech or petition activity." *Church of Scientology of Cal.* v. *Wollersheim*, 42 Cal. App. 4th 628, 646 (1996). The burden then shifts to the plaintiff to show "that there is a probability that [he] will prevail on the claim[s]." CAL. CIV. PROC. CODE § 425.16(b)(1); see *Wilcox*, 27 Cal. App. 4th at 820.

In ruling on the motion, a court "consider[s] the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." CAL. CIV. PROC. CODE § 425.16(b)(2). The special motion to strike may be brought within 60 days (or later, with permission), *id.* § 425.16(f); discovery is stayed while the motion is pending (unless a plaintiff can show good cause), *id.* § 425.16(g); a defendant whose special dismissal motion fails can take an immediate interlocutory appeal, *id.* § 425.16(j); and a prevailing defendant is entitled to fees and costs, *id.* § 425.16(c).

Critically for present purposes, as California courts have stressed, the motion to strike is "a mere rule of procedure." *Ludwig* v. *Superior Ct.*, 37 Cal. App. 4th 8, 21 (1995); see also *Robertson* v. *Rodriguez*, 36 Cal. App. 4th 347, 356

---

[5] The statute applies both to original actions and to counterclaims. Although this case happens to involve counterclaims, we refer to the parties bringing the anti-SLAPP motion to strike (respondents Newsham and Overbeek) as "defendant" and the party seeking to continue to maintain the action (petitioner Lockheed) as "plaintiff."

(1995) ("Section 425.16 does not change the legal effect of past conduct. It merely is a procedural screening mechanism.").

On its face, the California anti-SLAPP statute raises substantial due process concerns by restricting a plaintiff's opportunity to make a meaningful factual showing and impinges on traditional jury-trial rights allowing the court to dispose of a case on grounds that ordinarily would not warrant dismissal without trial. See *Opinion of the Justices (SLAPP Suit Procedure)*, 138 N.H. 445, 449-51, 641 A.2d 1012, 1014-15 (1994) (holding that a bill modeled on the California statute would be facially unconstitutional). But while the California courts have interpreted the statute to avoid these constitutional difficulties, application of the anti-SLAPP statute in federal court cannot be squared with the Rules Enabling Act.

A. The California Anti-SLAPP Statute Is Displaced By Federal Law

California's anti-SLAPP statute has features that are in conflict with at least four federal rules, Fed. R. Civ. P. 11, 12 and 56, and Fed. R. App. P. 5, and with 28 U.S.C. §§ 1291 and 1292. Because Rules 12 and 56 occupy the field of procedures designed to dispose of claims without trial, Rule 11 the field of sanctions for lawsuits whose purpose is to harass or cause unnecessary delay, and Appellate Rule 5 and Sections 1291 and 1292 the field of interlocutory appeals, the special motion to strike cannot be applied in federal court.

The federal rules of civil and appellate procedure are presumptively valid as both within the scope of the Rules Enabling Act, 28 U.S.C. § 2072, and as within Congress's power under the Constitution. See *Burlington N. R.R.* v. *Woods*, 480 U.S. 1, 6 (1987). Thus, in deciding whether to supplement the federal rules with a state-created procedural rule, a federal court must determine "whether the scope of the Federal Rule in fact is sufficiently broad to control the

issue before the Court." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749-50 (1980). If the federal rule is "sufficiently broad to cause a direct collision with the state law or, implicitly, to control the issue before the court," then it will "leav[e] no room for the operation of that [state] law." *Woods*, 480 U.S. at 4-5 (internal quotation marks omitted). The inquiry into a rule's scope has two steps. First, a court determines whether the purposes underlying a federal rule and a possibly conflicting state rule are "sufficiently coextensive" to indicate that the former occupies the same field as the latter. *Woods*, 480 U.S. at 7. Second, a court determines whether the federal and state rules may both be applied in the same case, or whether the application of one precludes the meaningful application of the other. See 19 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4510, at 24 (2d ed. 1996 & supp. 1999) (asking "whether the federal rule and the state rule can be applied contemporaneously").

Here, the Ninth Circuit erred in holding that both the federal rules and the anti-SLAPP statute "can exist side by side * * * each controlling its own intended sphere of coverage without conflict." Pet. App. 19a (citing *Walker*, 446 U.S. at 752). Indeed, it could not be more plain that the statute as a whole cannot be applied in federal courts. It is beyond dispute, for instance, that federal courts of appeals would not be required to entertain interlocutory appeals every time a federal district court denies a special motion to strike. *See* 28 U.S.C. §§ 1291, 1292; FED. R. APP. P. 5; *see also Rogers* v. *Home Shopping Network, Inc.*, 57 F. Supp. 2d 973, 980-82 (C.D. Cal. 1999) (holding that subsections 425.16(f) and (g) do not apply in federal court because the limits they place on discovery collide with the liberal discovery allowed under Rule 56). The Ninth Circuit did limit its decision to upholding the use of subsections 425.16 (b) and (c), allowing the special motion to strike and awarding fees and costs to a prevailing defendant. Pet. App. 18a-

19a. But even those sections of the anti-SLAPP statute cannot be applied in federal court.

As the Ninth Circuit itself acknowledged, the anti-SLAPP statute and the federal rules both serve the purpose of "expeditious[ly] weeding out * * * meritless claims before trial." Pet. App. 19a. Both are also aimed at protecting defendants from the financial hardship of defending against meritless claims brought only to harass. It is true, as the panel wrote, that the anti-SLAPP statute "is crafted to * * * protect[] * * * 'the constitutional rights of freedom of speech and petition for redress of grievances.'" *Ibid.* But it is not true that this is "an interest not directly addressed by the Federal Rules" (*ibid.*). Disposing of meritless attacks on constitutional freedoms is, rather, precisely one of the purposes served by the "weeding out" mechanisms embodied in Rules 12 and 56.

Not only do Rules 11, 12 and 56, on the one hand, and the anti-SLAPP statute, on the other, share the same purposes, but they also cannot both be applied in the same case without meaningless and burdensome redundancy, and explicit conflict.

To begin with, the standard for opposing a special motion to strike is essentially the same as that for opposing a motion for summary judgment. If a defendant has met his burden of showing that he was engaged in protected activity, "the plaintiff must demonstrate the complaint is * * * supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." *Wilcox*, 27 Cal. App. 4th at 823 (internal citations omitted). This *prima facie* showing is essentially the same as the standard in a summary judgment motion, where a party opposing such a motion "must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). Thus the California courts have emphasized that the test for a special motion to strike "is similar to the standard applied to evidentiary showings in

summary judgment motions." *Wollersheim*, 42 Cal. App. 4th at 654. Indeed, even the nature of the evidence is the same, "competent admissible evidence within the personal knowledge of the declarant." *Id.* Given the essential similarity of the standard for successfully opposing a special motion to strike and a motion for summary judgment, there is no reason to think that a defendant who failed on the former could prevail on the latter. The plaintiff would have already shown that there is a genuine issue as to a material fact. Allowing a defendant who lost his or her special motion to strike to move for summary judgment would be to give him or her a second bite at the apple, which would be wasteful, burdensome, and unfair. Thus the Ninth Circuit's claim that a party who fails to win a special motion to strike "remains free to bring a Rule 12 motion to dismiss, or a Rule 56 motion for summary judgment," Pet. App. 19a, is mistaken. (It should go without saying that it would be pointless to make a Rule 12 motion to dismiss after losing on a special motion to strike.)

Moreover, when it comes to fees and costs the rules explicitly conflict. Rule 11 governs in federal court the awarding of sanctions against plaintiffs who sue for an "improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." FED. R. CIV. P. 11(b)(1). These are precisely the concerns that the anti-SLAPP statute was designed to address. See *Wilcox*, 27 Cal. App. 4th at 815-16. But Rule 11 merely allows a judge to award a defendant "some or all of the reasonable attorneys' fees and other expenses," and only if the defendant made a Rule 11 motion and such an award is "warranted for effective deterrence." This discretionary award squarely conflicts with the automatic award of fees and costs to a defendant who prevails in a special motion to strike.

This is exactly the kind of conflict that this Court has already held precludes the use of state procedures in federal courts. In *Burlington Northern R.R.* v. *Woods*, the Court held that Federal Rule of Appellate Procedure 38 displaced

an Alabama statute that imposed a 10% penalty on any appellant who had obtained a stay of a judgment later affirmed without substantial modification. Rule 38 provides that "[i]f a court of appeals determines that an appeal is frivolous, it *may* * * * award just damages and single or double costs to the appellee" (emphasis added). The Court held that the discretionary aspect of Rule 38 "unmistakably conflict[ed] with the mandatory provision of Alabama's affirmance penalty statute." 480 U.S. at 7.

Other cases in which this Court has held that state procedural rules were not preempted by federal rules are easily distinguished. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), involved a New Jersey statute governing shareholder derivative actions that made an unsuccessful plaintiff liable for attorney's fees and required the posting of a bond as a condition of prosecuting the action. 337 U.S. at 543. Rule 23(b), by contrast, required "the stockholder's complaint to be verified by oath and to show that the plaintiff was a stockholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law." *Id.* at 556. The Court decided that there was no conflict between Rule 23 and the New Jersey statute. The federal rule was not concerned with liabilities but with standing and disclosure and notice to the court and the parties. *Id.* at 556. Thus, the purposes of the rules at issue in *Cohen* were different, unlike the rules at issue here and in *Woods*, which is why the state rule in *Cohen* survived. *Walker* v. *Armco Steel Corp.* is similarly distinguishable. That case involved an Oklahoma statute of limitations that deemed an action commenced only when a defendant was served; Rule 3, in contrast, provides that an action is commenced on the filing of a complaint. Rejecting the argument that the federal rule ousted the state statute, this Court held that the rule and the statute served different purposes. See 446 U.S. at 750-52 (noting that "[t]here is no indication that the Rule was intended to toll a state statue of limitations, much less that it purported to displace state

tolling rules for purposes of state statutes of limitations," while the Oklahoma statute promoted the important goals of fairness and allowing the defendant to have peace of mind after the established deadline).

In sum, even the rump portion of California's anti-SLAPP statute endorsed by the Ninth Circuit is incompatible with Rules 11, 12, and 56. Their purposes are essentially identical, while their effects conflict. When it comes to California's anti-SLAPP statute in federal court, therefore, there is "no room for the operation of that law." *Woods*, 480 U.S. at 5.

B. The Question Of The Applicability Of State Anti-SLAPP Statutes In Federal Court Is Worthy Now Of The Court's Review

Although among the courts of appeals only the Ninth Circuit has addressed itself to the question of whether anti-SLAPP statutes may be applied in federal court, the question is worthy of this Court's review. To begin with, the Ninth Circuit's decision was clearly wrong. Moreover, eleven states have enacted anti-SLAPP statutes similar to California's, and bills have been introduced in nine others.[6] The question will therefore arise with increasing frequency. Indeed, one district court has already decided, contrary to the Ninth Circuit, that state anti-SLAPP procedures do not apply

---

[6] Del. Code. tit. 10, §§ 8136–8138; Ga. Code § 9-11-11.1; Me. Rev. Stat. tit. 14, § 556; Mass. Gen. Laws ch. 231, § 59H; Minn. Stat. §§ 554.01–554.045; Neb. Rev. Stat. §§ 25-21,241 to 25-21,246; Nev. Rev. Stat. §§ 41.635–41.670; N.Y. Civ. Prac. L. & R. §§ 3211(g), 3212(h); N.Y. Civ. Rights L. § 70-a; R.I. Gen. Laws §§ 9-33-1 to 9-33-4; Tenn. Code §§ 4-21-1001 to 4-21-1004; Wash. Rev. Code §§ 4.24.510, 4.24.520. See generally Braun, *Increasing Slapp Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 1036-44 (1999) (discussing anti-SLAPP statutes outside California, and noting that as of 1999, anti-SLAPP laws had been introduced into the legislatures in nine states other than the ones listed above.)

in federal court. *Baker* v. *Coxe*, 940 F. Supp. 409, 416-17 (D. Mass. 1996); see also *Pepsi-Cola Co.* v. *Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266, 283-84 (D.R.I. 1997) (holding the Rhode Island anti-SLAPP statute pre-empted by the National Labor Relations Act); *AirTran Airlines, Inc.* v. *Plain Dealer Publ'g Co.*, 66 F. Supp. 2d 1355, 1368-70 (N.D. Ga. 1999) (assuming that the Georgia anti-SLAPP statute applied but rejecting the motion to strike).

There are, finally, substantial federal interests at stake here. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). It may be that the "special motion to strike" is a feature worth having in the federal system. That, however, is a decision not for lower federal courts that happen to sit in states with anti-SLAPP statutes, but for the Advisory Committee on Rules of Civil Procedure and for this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ANDREW L. FREY*
ROY T. ENGLERT, JR.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

**Counsel of Record*

FEBRUARY 2000